Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Argument:	
The City need not rezone residential property to commercial merely to afford more convenient access to other property that is commercially zoned	3
Conclusion	9
Appendix:	
Deed from Overbrook Development Company to Leimbach Construction Corporation, dated August 27, 1969 pertaining to Lots 10 and 21	11-14
Photographs of bridge area	15-19

Table of Citations

Statutes

28 U.S.C., Section 1257	2

Case

Linthicum v. Shipley, 140 Md. 96 (1922)	7

Text

93 C.J.S. "Waters" Section 84	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 604

LEIMBACH CONSTRUCTION COMPANY,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
A MUNICIPAL CORPORATION, AND
BETTIE O. SUMMERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals of Maryland is fully set out on pages la through 6a of the Appendix to the Petition of Writ of Certiorari (hereinafter referred to as "A") and is reported in 257 Md. 635, 264 A. 2d 109 (1970).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on April 13, 1970. The Respondents deny that 28 U.S.C., Section 1257, provides jurisdiction for consideration of the instant Petition for Writ of Certiorari.

QUESTION PRESENTED

The Respondents accept the substance of the Petitioner's question but submit that it should be rephrased to delete unsupported conclusions, assumptions and characterizations, as follows:

Must the City rezone residential property to commercial merely to afford more convenient access to other property that is commercially zoned?

STATEMENT OF THE CASE

The Petitioner operates a construction business from its property in north Baltimore. In order to obtain a tract of ground on which to erect larger plant facilities for the housing and operation of its heavy duty equipment and large trucks, the Petitioner took options on two separate properties in southwest Baltimore near the St. Agnes Hospital. The one tract of land (Lots 10 and 21) contains about six acres irregular in shape. It is undeveloped and it has been zoned Commercial and was held for over 50 years by a development company. The other lot, across a stream, contains only an acre of ground, which is also irregular in shape, is zoned Residential (Lot "P").

The large commercial tract (Lots 10 and 21) is bound on the northwest by the railroad right-of-way, on both the southwest and the northeast by other commercial prop-

erties and the remaining side of the property is bound generally by the course of Maiden Choice Run (Plat, A. 7a). It will be noted, on the Petitioner's plat, that apparently Maiden Choice Run is wholly within the Petitioner's property line. The remaining land on the far side of the Petitioner's commercial property (to the southeast across Maiden Choice Run) is a residential development for almost a half dozen blocks to Wilkens Avenue which separates it from the hospital grounds to the south.

The Petitioner had acquired only options from the several owners on both the large commercial tract and the small residential lot (Lot "P") at the time it attempted to obtain a *rezoning* of Lot "P" from Residential to Commercial so that the Petitioner could use a portion of Lot "P" as a low cost roadway from Primson Avenue to Lot 10 of the commercial tract. It was the denial of this rezoning or "special exception" which precipitated the instant litigation.

ARGUMENT

THE CITY NEED NOT REZONE RESIDENTIAL PROPERTY TO COMMERCIAL MERELY TO AFFORD MORE CONVENIENT ACCESS TO OTHER PROPERTY THAT IS COMMERCIALLY ZONED.

The question presented to this Court is not a question of law but only a question of fact. That fact is whether the Petitioner has *any* access to its commercial tract on the northwest side of Maiden Choice Run which is generally the southeast boundary of the Petitioner's commercial tract and also the northwest terminus of Primson Avenue.

It is true that the Petitioner generally bantered the characterization "denial of access" in the hearings below, but at no point did it ever attempt to present any evidence that there was a denial of access. In fact at the time of the administrative hearing before the Board of Municipal and

Zoning Appeals, the Petitioner did not own the property but merely held an option to purchase. It was after the adverse result of that administrative hearing that the Petitioner exercised its option and subsequently received its Deed to the commercial tract. The conveyance was completed on August 27, 1969, which is over two months after the decision of the trial court on appeal from the administrative body. It was during this period of time, at the latest, when the Petitioner learned as a fact that its property extended to the center of the stream (Maiden Choice Run). It was probably because the Petitioner knew as a fact that it purchased and owned to the middle of the stream that it never attempted to present any evidence of title and was satisfied to continue to make the false assertion that the stream was wholly on City property.

The Court of Appeals of Maryland in its Opinion found *as a fact* that there was access to the Petitioner's large commercial lot (A. 5a). The Court of Appeals observed that the present physical condition of the southeast border of the Petitioner's large commercial tract may not presently permit truck ingress and egress from the paved portion of Primson Avenue across it to the southeast Maiden Choice Run boundary. The Court of Appeals noted that other types of access were now possible. This in itself is determinative of the question of denial of *all* access. There is not, in fact, denial of *all* access to the commercial tract (Lots 10 and 21). As a matter of actual fact, there is not even a denial of truck traffic access to and from this commercial tract to Primson Avenue if the Petitioner is willing to expend its own funds, rather than the taxpayers, to build the necessary bridge across Maiden Choice Run which is *partially* located on its property, notwithstanding the erroneous allegation to the contrary in its Petition (pages 3 and 6).

The Petitioner insists that the City must rezone or grant a "special exception" as to the residential Lot "P" to permit tractor-trailer and heavy construction equipment access to Lots 10 and 21 in the commercial tract, unless the City, at the expense of the taxpayers, is willing to construct a heavy duty bridge across Maiden Choice Run to extend Primson Avenue into the interior of the Petitioner's Lots 10 and 21. Since the Petitioner exercised its option and obtained conveyance of all three lots (from two different grantees) *after* the denial of the rezoning or "special exception" by the Board of Municipal and Zoning Appeals, there is no question of hardship involved. As a matter of fact even if the zoning of Lot "P" was changed to commercial, Petitioner would still be required to bridge Maiden Choice Run in order to gain vehicle access to Lots 10 and 21 from Lot "P".

The Petitioner never presented any evidence of title as to the stream, or remnants of the old wooden foot bridge which crossed it some 40 years ago, at the end of Primson Avenue. The burden of establishing ownership was on the Petitioner, as applicant, for a zoning change or "special exception". The record is devoid of the ownership, except as to such inference as may be drawn from the lines appearing on the plat reproduced both in the Petitioner's Appendix (A. 7a) and at the end of the Maryland Court of Appeals Opinion (257 Md. 635, 641). If this plat, upon which the Petitioner relies, is accurate, the stream is wholly within its property line and this is in direct contradiction to the allegations in the Petition (pages 3 and 6) that:

> ". . . the City has refused to repair or rebuild the bridge on the land *owned by it.*" (Emphasis supplied)

The Petitioner was responsible at the hearings and trials below to establish the ownership of the stream and of the

bridge, if it was to hold the City responsible for denying it all access to Primson Avenue which abuts perpendicularly to the southeast side of its property. It failed to meet this responsibility and burden. The only evidence before the administrative body, the trial court and the Court of Appeals of Maryland was the subject plat which would indicate that the stream is within the Petitioner's property and thus there would be no duty on the City to acquire an easement from the Petitioner to erect a bridge for the Petitioner's commercial benefit at the expense of the taxpayers. The estimated cost of such bridge was $30,000 to $35,000 (257 Md. 635, 635; A. 2a).

The Respondents were never aware that the vague reference to "denial of access" which the Petitioner used during the course of the litigation, with other legal stereotypes, was intended to mean that the City in fact owned the bed of the stream. The Petitioner never presented this factual assertion or any proof in support of it before the administrative body or the trial court. It was not even asserted in the Maryland Court of Appeals. The first time that the Respondents made this false assertion was in the Petitioner's Petition before this Honorable Court (pages 3 and 6). In the short period of time available to the Respondents to prepare this Brief, there was no opportunity to have a detailed title search and physical survey made of the area. The Respondents have acquired a copy of the Deed which the Petitioner received from its grantees of the large commercial tract on August 27, 1969 and that Deed is set out in full in the Appendix to this Brief. The Court's attention is invited to the metes and bounds description which appears in that Deed to the effect:

> ". . . and to the center of Maidens Choice Run; thence, running with and binding on the third line of the land described in said last mentioned deed as the same calls

> to bind on the center of Maidens Choice Run, the four following courses and distances, . . .; thence, still binding on or near the center of Maidens Choice Run and to and along the second line of the land described in said first mentioned deed, . . ."

It is apparent from the Deed, which has been in the possession of the Petitioner for over a year, that it has actual knowledge that the stream is not on the land of the City but in fact at least half on the Petitioner's own land. Here there is an express grant to the Petitioner to the center of the stream. The general rule is that a grant on a non-navigable stream conveys to the center of the stream. 93 C.J.S. "Waters" Section 84. Maryland law holds with this majority. *Linthicum v. Shipley*, 143 Md. 96, 99 (1922). This factual question should not have been raised as a mere allegation for the first time in the Supreme Court of the United States. Even if it were true, evidence of the ownership of the stream bed should have been introduced at the administrative hearing or at the latest in the trial court. The Petitioner conveniently ignored this procedure and was satisfied to merely assert that the City was unwilling to rebuild a bridge on its own land. For the information of this Honorable Court, the Respondents are including five pictures in the Appendix hereto.

First, a picture which was taken on October 27, 1932 and which shows the flimsy wooden pedestrian bridge that existed from Primson Avenue across Maiden Choice Run to the subject commercial tract. The City is without information as to who built this bridge or when. There is speculation that it was built by the previous owner of the commercial tract, which for a period of time had several residences on it. There was other speculation that the bridge may have been built by Baltimore County at some time prior to the City's annexation of the area in question. There

is no time to investigate and develop these fact which should be the burden of the Petitioner in any event.

Second, are four pictures, which were introduced in the record below, showing the remnants of the stone piers which supported the old wooden pedestrian bridge. These pictures represent the present physical condition of the bridge and Maiden Choice Run at the end of Primson Avenue today.

From the Deed, it is clear that the Petitioner owns to the center of the stream and that the City in fact does not own the bed of the stream or the land on the far side of the stream from Primson Avenue. From the pictures it is apparent that there was never street access to the subject commercial tract. It is obvious that the Petitioner can develop any type of access that it cares to so long as it does it at its own expense and that it does not attempt by litigation to transfer that whole burden to the taxpayers; or in the alternate, attempt to force the municipal zoning agency to grant a "special exception" (which is in fact rezoning) of the residential lot designated as Lot "P". The City is well aware of the directive of the Court of Appeals of Maryland in the last paragraph of its Opinion (A. 6a) to the effect that the City must act in good faith with respect to the construction of any bridge. The City will in good faith cooperate in an attempt to solve the problem within the limits of its legal powers and duties.

CONCLUSION

The Petitioner's allegation that the City's refusal to re-zone or grant a "special exception" to allow a commercial road across a residential lot to provide a cheaper commercial roadway to a commercial tract on the far side of a meandering stream in effect denied all access was not proven before the administrative body or the trial court and is in fact untrue. The stream is not on City land but is at least half on the Petitioner's land and thus it would have the responsibility of paying for the cost of any bridge at least to the center of the stream. Even without a large modern expensive bridge, which would sustain heavy construction equipment and tractor-trailers, the Petitioner has other means of access to the subject commercial tract and thus cannot allege that it is being denied all access. At the most, the Petitioner may be unable or unwilling to provide access for highly specialized types or equipment without a substantial outlay on its own part. There is no duty on taxpayers of a municipality to provide an easy form of access to private property.

Respectfully submitted,

GEORGE L. RUSSELL, JR.,
City Solicitor,
CLAYTON A. DIETRICH,
Chief Assistant Solicitor,
MARVIN M. POLIKOFF,
Attorneys for Respondents.

APPENDIX

APP. No. 228

THIS DEED, Made this 27th day of August in the year one thousand nine hundred and sixty nine, by and between Overbrook Development Company, a body corporate of the State of Maryland, party of the first part; and Leimbach Construction Corporation, a body corporate of the State of Maryland, party of the second part.

Witnesseth, that in consideration of the sum of five dollars and other good and valuable considerations, the receipt whereof is hereby acknowledged, the said party of the first part does hereby grant and convey unto the party of the second part, its successors and assigns, in fee simple, all that parcel of ground, situate, lying and being in Baltimore City, State of Maryland, and described as follows, that is to say:

Beginning for the same at the end of the fourth line of the parcel of land described in a deed from George P. Crist and wife to John F. Resendes and wife dated August 17, 1959 and recorded among the Land Records of Baltimore City in Liber JFC 696, folio 380 etc. said place of beginning being also in the fourth line of the land described in a deed from Manor Real Estate and Trust Co. to Philadelphia, Baltimore and Washington Railroad Co. dated October 14, 1914 and recorded among the Land Records of Baltimore County in Liber WPC No. 435 folio 346 etc. at a point distant 243.00 feet northwesterly from the end thereof and running thence, binding on a part of said last mentioned line reversely as now surveyed, North 36 degrees and 52 minutes West 147.37 feet to the southeasternmost outline of the land conveyed by Overbrook Development Co. to Philadelphia, Baltimore and Washington Railroad Co. by deed dated November 10, 1931 and recorded among the Land Records of Baltimore City in Liber SCL No. 5277 folio 455 etc.; thence, binding on the southeasternmost outline of the land conveyed by said last mentioned deed, the two following courses and distances, to wit: North 29 degrees and 13 minutes East 537.66 feet and North 33 degrees and 04 minutes East 544.26 feet to the end of the first line of the parcel

of land thirdly described in a deed from LePage's, Inc. to National Starch Products, Inc. dated July 2, 1956 and recorded among said Land Records in Liber MLP 10279 folio 573, etc.; thence, binding reversely on the first line of the land described in said last mentioned deed to the beginning thereof and continuing the same direction, in all, South 15 degrees and 24 minutes East 571.09 feet to the end of the second line of the land described in a deed from Mary E. Pietsch, widow, to Petfar Land Corporation dated February 1, 1949 and recorded among said Land Records in Liber MLP 7691 folio 141, etc. and to the center of Maidens Choice Run; thence, running with and binding on the third line of the land described in said last mentioned deed as the same calls to bind on the center of Maidens Choice Run, the four following courses and distances, to wit: South 71 degrees, 52 minutes and 30 seconds West 189.91 feet; South 59 degrees and 02 minutes West 86.00 feet; South 50 degrees and 15 minutes West 86.00 feet and South 39 degrees and 02 minutes West 61 feet to a point in line with the second line of the land described in the deed from George P. Crist and wife to John F. Resendes and wife firstly hereinbefore referred to; thence, still binding on or near the center of Maidens Choice Run and to and along the second line of the land described in said first mentioned deed, in all, South 44 degrees and 28 minutes West 45.00 feet and thence, running with and binding on the third and fourth lines of the land described in said first mentioned deed and in part along the center of said Run, the two following courses and distances, to wit: South 11 degrees and 55 minutes, West 93.50 feet and South 53 degrees and 08 minutes West 277.00 feet to the place of beginning. Containing 6.156 acres of land, more or less. (Ws Primson 629 — N. Wilkens)

Being part of the whole tract of land described in a deed from Louden Park Cemetery Co. to Overbrook Development Co., the grantor herein, dated December 17, 1912 and recorded among the Land Records of Baltimore City in Liber SCL 2790 folio 356, etc.

The courses in the above description are referred to the True Meridian adopted by the Baltimore Survey Control System.

Subject to the rights of the Mayor and City Council of Baltimore in and to certain rights of way for sewers under the terms of two agreements — one with Overbrook Development Co. dated December 4, 1935 and recorded among said Land Records in Liber SCL 3601 folio 47, etc. and another with Petfar Land Corporation and Overbrook Development Co. dated January 10, 1930 and recorded among said Land Records in Liber MLP 7989 folio 275, etc.

Subject also to any rights the Mayor and City Council of Baltimore may have in the bed of Primson Avenue as heretofore laid out through the above described property.

Together with the buildings and improvements thereupon erected, made or being and all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging, or anywise appertaining.

To Have And To Hold the said parcel of ground and premises, above described and mentioned, and hereby intended to be conveyed; together with the rights, privileges, appurtenances and advantages thereto belonging or appertaining unto and to the proper use and benefit of the said party of the second part, its successors and assigns, in fee simple.

And the said party of the first part hereby covenants that it has not done or suffered to be done any act, matter or thing whatsoever, to encumber the property hereby conveyed; that it will warrant specially the property granted and that it will execute such further assurances of the same as may be requisite.

Witness the corporate seal of said Grantor and the signature of its President.

OVERBROOK DEVELOPMENT COMPANY,
HARRY C. PRESBROEK, III
President

Test: (Corporate Seal)

GEORGE E. THOMSEN

State of Maryland, Baltimore City, to wit:

I Hereby Certify, That on this 27th day of August, 1969, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City personally appeared Harry C. Primrose, III who acknowledged himself to be the President of Overbrook Development Company, a corporation, and that he as such President, being authorized so to do, executed the within instrument for the purposes therein contained, by signing in my presence, the name of the corporation by himself as such President.

In Witness Whereof, I hereunto set my hand and official seal.

(Notary Seal) J. DARLENE WALTER,
Notary Public

My Commission expires: July 1, 1970.

Rec'd for record Oct. 23, 1969 9 A.M. and recorded in the Land Records of Baltimore City, Liber R.H.B. 2575, Page 142

ROBERT H. BOUSE,
Clerk

In the Superior Court of Baltimore City

State of Maryland, City of Baltimore, Sct.

I, ROBERT H. BOUSE, Clerk of the Superior Court of Baltimore City, do hereby certify that the aforegoing is a true copy of the original Deed taken from the records of the said Superior Court of Baltimore City as recorded in Liber R.H.B. No. 2575, Folio 142, one of the Land Records of Baltimore City.

In Testimony Whereof, I hereto set my hand and affix the seal of said Court, this 30th day of November A.D. 1970

ROBERT H. BOUSE,
Clerk of the Superior Court of Baltimore City.

(Seal)

PRINCE AVENUE OVER RAINEY
CHOICE BUS LOOKING SOUTH

LOOKING NORTH FROM SITE OF
PROPOSED DRIVEWAY

LOOKING EASTERLY FROM STREAM SHOWING SITE OF PROPOSED DRIVEWAY AND PRIDSO AVENUE

LOOKING NORTHEASTERLY TO OLD BRIDGE

LOOKING NORTHEASTERLY TO SITE OF OLD BRIDGE AND PROPOSED DRIVEWAY